Haidar J: The plaintiff, Chai Cheon Kam alias Tsai Chon Kam, filed a summons-in-chambers dated 2 November 1988 (encl 46) under O 14 r 1(1) of the Rules of the High Court 1980 ('RHC') that final judgment be entered against the defendant as prayed for in the plaintiff's statement of claim dated 22 May 1986 as amended on 4 August 1988 and in support thereof, he affirmed an affidavit. The manner in which an application under r 1 of O 14 of RHC must be made is prescribed under r 2(1) which reads:

> 2(1) An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponents's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of damages claimed.

In an application under O 14, the affidavit must satisfy the following three requirements:

(a) It must be made by the plaintiff or by any person duly authorised to make it and who can swear positively to the facts;
(b) it must verify the facts on which the claim or part of a claim to which the application relates is based; and
(c) it must state the deponent's belief that there is no defence to that claim or part, or no defence except as to the amount of any damages claimed.

If the three requirements mentioned are satisfied then the court or a judge can be said to have jurisdiction to hear the application as the clear provisions of O 14 are mandatory and they must be complied with. (See *Tan Tik Sing* v *Gomez Development Co Sdn Bhd.*[1]) It is then pertinent to consider the contents of the affidavit of Chai Cheon Kam alias Tsai Chon Kam to see whether the three requirements are satisfied.

It would appear that requirement (a) is satisfied as the affidavit was sworn to by the plaintiff personally and similarly requirement (c) too is also satisfied (see para 13 of the affidavit). Requirement (b), I think, needs scrutiny by the court as to whether the deponent has sufficiently complied with it. Now, the relevant paragraph relied on by the affidavit of the plaintiff for the purpose of satisfying requirement (b) is para 2. Paragraph 2 reads:

> I crave leave to refer to the plaintiff's amended statement of claim amended on 4 August 1988, the defendant's defence dated 18 August 1988 and the plaintiff's reply dated 28 August 1988.

Paragraph 1 in Form 18 of RHC to which the affidavit must comply, reads:

> 1 The defendant ... is, and was at the commencement of this action, justly and truly indebted to (me, or the abovenamed plaintiff) in the sum of ... for the ... The particulars of the said claim appear by the indorsement on the writ of summons in this action.

By way of comparison between para 2 of the affidavit and para 1 of Form 18 it cannot be said that the plaintiff has sufficiently complied with Form 18 as to the verification of facts on which the claim or part of a claim to which the application relates is based other than perhaps satisfying the second part of para 1 in Form 18. It is true that the affidavit need not set out all the particulars, nor verify the facts except by reference to the statement of claim (*May* v *Chidley*[2]) but the verification may be by reference to the facts stated in the statement of claim, thus: 'the defendant is justly and truly indebted to the plaintiff in the sum of ... for the ... (set out the short particulars).' In my opinion, the plaintiff has failed to sufficiently comply with Form 18 as to the verification of facts and hence failed to satisfy requirement (b) and in the result the plaintiff's application for summary judgment under O 14 of the RHC was therefore deficient for want of mandatory compliance with r 2(1) and I ought therefore to dismiss the application with costs and I do so order accordingly.

Application dismissed.

Solicitors: *Satem, Sagah & Chai*; *Chua & Co.*

Reported by *Ng Sheau Jiuan*

Ansa Teknik (M) Sdn Bhd v Cygal Sdn Bhd

HIGH COURT (JOHORE BAHRU) – COMPANIES (WINDING-UP) NO 42-13 OF 1988
LC VOHRAH J
22 MARCH 1989

Companies and Corporations – Winding-up – Civil suit filed by petitioner – Application for summary judgment – Dispute as to amount claimed – Application for summary judgment dismissed – Discontinuance of civil suit without leave – Application for winding-up – Application for injunction restraining further winding-up proceedings – Petitioner proceeded with advertisement – Application to strike out petition – Whether application properly made – Companies Act 1965, s 218

Civil Procedure – Winding-up petition – Application to strike out – No reasonable cause of action – Abuse of the process of the court – Whether application properly made – Rules of the High Court 1980, O 18 r 19

This was an application by the respondent for the winding-up petition to be struck out under O 18 r 19 of the Rules of the High Court 1980 on the ground that it disclosed no reasonable cause of action and/or that it was an abuse of the process of the court.

The petitioner originally filed an action in CS No 23-1317-86 on 6 October 1986 through its former solicitors for the sum of $158,449.59 being allegedly the sum outstanding for the supply of granite. The respondent filed its statement of defence disputing this amount. The petitioner then filed an application for summary judgment which was heard and dismissed. Notice

of change of solicitors was filed on 26 November 1987 and notice of discontinuance was filed later on 28 November 1987 by the new solicitors without leave of the court. The new solicitors then sent a notice pursuant to s 218 of the Companies Act 1965 requiring the respondent to pay up the sum of $158,449.59 together with interest within 21 days of service. This statutory notice was served on the solicitors for the respondent on 4 January 1988 who by a letter dated 5 January 1988 disputed the amount claimed and drew the attention of the petitioner's solicitors to the dismissal of the petitioner's earlier application for summary judgment in the discontinued suit. The petitioner then filed its petition and on 9 March 1988 the respondent filed a notice of motion for an injunction to restrain the petitioner from taking any further proceedings upon the petition whether by advertising it or otherwise, due notice of which was formally given to the petitioner by way of a letter dated 7 March 1988. Nonetheless, the presentation of the petition was advertised on 5 May 1988 in the New Straits Times.

Held, allowing the application:

(1) Order 18 r 19(3) specifically provides that the rule applies to a petition which must include a winding-up petition. The court did not see the relevance of s 221 Companies Act 1965 as what was seised of by the court on the day of the hearing was not the winding-up petition but the application to strike out the petition under O 18 r 19. The application was properly before the court and on the evidence presented there was a bona fide dispute as to the amount that was owing to the petitioner. The dispute was the subject of the civil suit which had not been properly discontinued by the petitioner's solicitors for want of leave of the court under O 21 r 2(1) so that the civil suit could be considered as still pending between the parties.

(2) The filing of the notice of discontinuance and the subsequent presentation of the winding-up petition were all acts calculated to circumvent the normal course of going to trial after the dismissal of the application for summary judgment under O 14 and to embarrass the respondent. In the circumstances the presentation of the winding-up proceedings was considered as an abuse of process of the court.

(3) The court granted an order in terms of the first three prayers of the application, ie the petition be struck out, costs of the application be borne by the petitioner and a date be fixed for enquiry into the damages suffered by the respondent.

Cases referred to

1 *Ng Ah Kway* v *Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58 (refd)
2 *NKM Development Sdn Bhd* v *Irex Sdn Bhd* [1988] 1 CLJ 65 (folld)

Legislation referred to

Companies Act 1965 ss 218, 218(2)(c), 221, 222
Rules of the High Court 1980 O 14, O 18 r 19, O 18 r 19(3), O 21 r 2(1)

John Fam for the respondent/applicant.
Ong Ban Chai for the petitioner/respondent.

Cur Adv Vult

LC Vohrah J: This was an application on the part of the respondent for the winding-up petition to be struck out under O 18 r 19 of the Rules of the High Court 1980 on the ground that it disclosed no reasonable cause of action and/or that it was an abuse of the process of the court.

The facts of the case as discerned from the records are as follows. The petitioner originally filed an action in CS No 23-1317-86 on 6 October 1986 through its then solicitors, Messrs AL Looi, for the sum of $158,449.59 being allegedly the sum outstanding for the supply of granite. The respondent filed its statement of defence on 20 November 1986 disputing this amount and alleging, inter alia, that the petitioner had included in this amount the cost of goods which had been ordered by one Silicon Jaya Sdn Bhd. On 27 December 1986 the petitioner filed an application for summary judgment under O 14 and this application was heard and dismissed on 10 November 1987 but no appeal was lodged by the petitioner. Notice of change of solicitors was filed on 26 November 1987 and notice of discontinuance was filed two days later on 28 November by the new solicitors Messrs Ong Ban Chai & Co without leave of the court contrary to the provisions of O 21 r 2(1). By a letter dated 25 November 1987 Messrs Ong Ban Chai & Co wrote to the solicitors for the defendant enclosing the notice of discontinuance and requesting negotiations between the parties with a view to settlement. Apparently no settlement was reached. Messrs Ong Ban Chai & Co then sent a notice pursuant to s 218 of the Companies Act, 1965 dated 30 December 1987 requiring the respondent to pay up the sum of $158,449.59 together with interest within 21 days of service. This statutory notice was served on the solicitors for the respondent on 4 January 1988 who by a letter dated 5 January 1988 disputed the amount claimed and drew the attention of the petitioner's solicitors to the dismissal of the petitioner's earlier application for summary judgment in the discontinued suit. On 31 January 1988 the petitioner filed its petition and on 9 March 1988 the respondent filed a notice of motion for an injunction to restrain the petitioner from taking any further proceedings upon the petition whether by advertising it or otherwise, due notice of which was formally given to the petitioner by way of a letter dated 7 March 1988 from the solicitors of the respondent sent by AR registered post to the solicitors of the petitioner enclosing an unsealed copy of the notice of motion and its supporting affidavit. Nonetheless, the presentation of the petition was advertised on 5 May 1988 in the New Straits Times.

It was the contention of Mr John Fam, counsel for the applicant respondent, that on the authority of *Ng Ah Kway* v *Tai Kit Enterprise Sdn Bhd*[1] because a petition for the winding-up of a company is a serious matter as it affects the reputation of the company, the petitioner had to show that:

(a) a debt which it is claiming is a liquidated and undisputed debt; and
(b) the respondent must be insolvent in the sense relevant to winding-up.

It was urged upon the court that unless there was a clear and unequivocal admission of the petitioner's debt as

claimed there was no basis for winding-up proceedings to be instituted and accordingly the petition had to be struck out. It was also urged upon the court, if I understood Mr Fam correctly, that the question of the debt was in fact sub judice as the civil suit was in effect still pending because the notice of discontinuance was defective as it was filed in breach of O 21 r 2(1).

In response, Mr Ong Ban Chai, counsel for the petitioner, argued that the application itself was 'not proper' as the respondent should have proceeded under s 221 of the Companies Act and that in any event upon the presentation of the winding-up petition the court could order a stay of the proceedings in the civil suit under s 222. He argued further that the winding-up petition had to be heard and the main issue the court had to consider under s 218(2)(c) was whether the respondent was unable to pay its debts and in such consideration the prospective liabilities of the respondent had to be taken into account.

Order 18 r 19(3) specifically provides that the rule applies to a petition which must include a winding-up petition (see *NKM Development Sdn Bhd* v *Irex Sdn Bhd*[2] at p 66). I did not see the relevance of s 221 as what was seised of by the court on the day of the hearing was not the winding-up petition but the application to strike out the petition under O 18 r 19. I was satisfied that the application was properly before me and I was also satisfied on the evidence presented that there was a bona fide dispute as to the amount that was owing to the petitioner. That dispute was the subject of the civil suit, which had not been properly discontinued by Messrs Ong Ban Chai & Co for want of leave of the court under O 21 r 2(1) so that the civil suit could be considered as still pending between the parties. I could not help thinking that the filing of the notice of discontinuance and the subsequent presentation of the winding-up petition were all acts calculated to circumvent the normal course of going to trial after the dismissal of the application for summary judgment under O 14 and to embarrass the respondent. In the circumstances I considered the presentation of the winding-up proceedings as an abuse of the process of the court and I accordingly granted an order in terms of the first three prayers of the application, ie that the petition be struck out, that costs of the application be borne by the petitioner and that a date be fixed for enquiry into the damages suffered by the respondent.

Order accordingly.

Solicitors: *PC Low & Co*; *Ong Ban Chai & Co.*

Reported by *Wong Kim Fatt*

Teng Foh t/a Teng Foh Construction v Liwu Realty Sdn Bhd

HIGH COURT (JOHORE BAHRU) – COMPANIES (WINDING-UP) NO 42-125 OF 1986
LC VOHRAH J
22 MARCH 1989

Companies and Corporations – Winding-up – Petition based on default judgment – Application by respondent to set aside judgment – Withdrawal of suit by plaintiff – Application to set aside winding-up order – Petition could not stand after withdrawal of suit

This was an application by the respondent for the setting aside of an order to wind up the respondent. The petition for winding-up of the respondent was based on a judgment in default of appearance in Civil Suit No C 4553 of 1985 in the High Court at Kuala Lumpur for the sum of $266,150 together with interest and costs. The respondent as defendant in the civil suit made an application to set aside the default judgment and the application was fixed for hearing on 14 October 1987. However, before the hearing, the petitioner as plaintiff in the civil suit filed an application to withdraw the civil suit and an order for such withdrawal was granted. Meanwhile the petition had come up for hearing in the High Court at Johore Bahru but was adjourned twice. On 25 April 1988, in the absence of the respondent's counsel the court on the application of the counsel for the petitioner granted an order in terms of the petition for the winding-up of the respondent. Counsel for the respondent argued that the petition could not stand because the civil suit which the default judgment had been obtained no longer existed having been withdrawn at the instance of the petitioner, so that the petition could not be sustained as the judgment upon which the petition was founded could not subsist independently of the civil suit from which it arose.

Held, allowing the application:

(1) The argument of counsel for the respondent/applicant clearly indicated that prima facie the petition as it stood could not be sustained. As a matter of common sense and in the light of authorities, the court took the view that the winding-up order should in the circumstances not have been made and should be set aside.

(2) An order in terms of the application was granted for: (a) all proceedings consequential upon the winding-up order to be stayed; (b) the winding-up order to be set aside and the petition set down for hearing; and (c) the respondent upon the setting aside of the winding-up order to publish and advertise notices of such order and to serve them upon the Registrar of Companies and the Official Receiver.

(3) The court further ordered that the costs of this application be borne by the petitioner in any event.

Case referred to

1 *Re Anglo-Bavarian Steel Ball Company* (1899) Weekly Notes 80 (refd)

Legislation referred to

Companies (Winding-Up) Rules 1972 r 194

YP Yeo for the respondent/applicant.
Ong Ban Chai for the petitioner/respondent.

Cur Adv Vult